

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 53/2008**

**BEFORE: THE HON MRS JUSTICE HARRIS JA  
THE HON MR JUSTICE DUKHARAN JA  
THE HON MRS JUSTICE MCINTOSH JA**

**DWIGHT JOHNSON v R**

**Jack Hines for the applicant**

**Mrs Karen Seymour Johnson for the Crown**

**28 November 2012 and 19 December 2013**

**DUKHARAN JA**

[1] The applicant, Dwight Johnson, was convicted in the Home Circuit Court in Kingston on 15 April 2008, for the offence of wounding with intent. On 18 April he was sentenced to 10 years imprisonment at hard labour.

[2] On 28 November 2012, we heard arguments, when we refused leave to appeal, affirmed the conviction and sentence, with sentence to commence from 18 July 2008. We promised to put our reasons in writing and this we now do.

### **The prosecution's case**

[3] The evidence advanced by the prosecution was that, on 2 September 2005, at about 6:40 am., the complainant Mr Procannon McKnight was sleeping at the home of his girlfriend Veronica Scott at the Barclays Building on East Street in Kingston. His face was to the wall when he was slapped from behind. He jumped up and turned around and felt something running down his arm. When he felt it, he realised that it was blood. At the same time, he saw the applicant, whom he knew as 'Fat Stuff', standing before him with a machete in his hand. The complainant said that he asked the applicant what that was for. The applicant responded with some expletives and started swinging the machete which chopped the complainant's right hand. The applicant rushed towards the complainant again, but this time aimed for his neck. The complainant, in defence, held up his left hand and the applicant chopped it off. The complainant bawled out for murder, then ran through the door and into the room occupied by Veronica Scott's children. He then jumped through the window and ran to the Central Police Station where he made a report to Detective Corporal Rohan Reid who sent him to the Kingston Public Hospital.

[5] Corporal Reid testified that on the morning of the incident, at about 6:50 am, the complainant came to the police station. He observed that the left hand of the complainant was missing, blood was spewing from the site and his right arm and hand had chop wounds. Based on the report he received, he went to the home of the complainant. On his arrival, he saw a trail of blood leading to the complainant's room. He then went to the applicant's house where he was greeted by a woman who opened

the door. He saw the applicant sitting on a bed. He cautioned the applicant and told him of the report that he had chopped off the hand of the complainant. The applicant denied that he had chopped anyone. Corporal Reid retrieved a machete leaning against the bed which appeared to have bloody water on it and took the applicant along with the machete to the Central Police Station.

### **The defence**

[6] The defence of the applicant was one of alibi. In an unsworn statement from the dock, he said he was a decent citizen living at 28 East Queen Street. He said when the incident occurred he was in his room sleeping. His girlfriend had awakened him and told him that someone was knocking at the door. He told her to open the door and he walked to the door behind her. He said he saw the officer, Corporal Reid, who told him that the complainant had made a report to him (Corporal Reid) about him chopping off the complainant's hand. He denied the allegation and was told by the officer to put on some clothes and go with him. He said while he was being taken to the station he saw Veronica Scott, who said, in the presence of the officer, that it was not he, the applicant, who had chopped off her boyfriend's hand but it was his brother Damion who had done so.

### **Grounds of appeal**

[7] Mr Hines, for the applicant, abandoned the original grounds, but sought and was granted leave to argue supplemental grounds which are as follows:

"1. The learned Judge erred in that she failed to direct the Jury and treat adequately with the crux of the evidence in that there was no over-arching direction from the Judge that it is the duty of the investigating officer to take a statement from all parties who can assist in the investigation. Hence she did not do the following:

- (a) she did not tell them that he is bound by his duty to take a statement from Veronica Scott who told the officer that it was not the Applicant but the Applicant's brother Damon [sic] who wounded the complainant. Nor [sic]
- (b) nor did she tell them that he had a duty to seek out and take a statement from Damion, the alleged perpetrator, nor
- (c) did she tell them that he had a duty to take a statement from the lady who opened the door to the room where the applicant was on the morning of [sic] arrest as his cardinal defense was one of alibi and she could have possibly [sic] have assisted with his whereabouts as to the material time when the incident took place (see page 92 of Notes of Evidence in particular)
- (d) This failure to so direct the jury denied the applicant of a possible successful defense [sic] and more importantly a fair trial as guaranteed by section 20 (1) of the Jamaica [sic] Constitution.

2. The Learned Judge further erred when she directed the Jury as follows:

- (a) on page 46 lines 8-14 of her summing up

'even if he Detective Reid found Damion what is he going to do with Damion, because Mr. McKnight (the complainant says is Fat Stuff (Dwight Johnson)). So if he goes on and arrests Damion who is going to say is Damion when (the man) already say we don't know, me don't know, there is no evidence of who would be able to point out Damion'. "In this she forgets to tell them that Veronica Scott did tell the Investigating Officer that it was Damion who was the perpetrator.

- (b) The learned trial judge erred in stating somewhat inexplicably (see line 18 on page 45 to line 3 of page 46 of her summation in particular) and I quote from lines 18-22 of page 45: 'I might seem to be saying the officer failed in his investigations and I don't wish to share my opinion about that with you because the officer to my mind, does look very enthusiastic' end of quote – in that (a) the failing of an investigating officer in this case is a matter of paramount importance and is not a private matter for the judge's opinion and (b) the fact that he is enthusiastic is no good reason or no reason at all to deny the jury her guidance on this important matter.
3. The Learned Judge erred in that upon hearing the crowns [sic] case she should have realized that it [sic] as manifestly unfair and in breach of section 20 (1) OF the Jamaica [sic] Constitution in that an agent of the Crown was derelict in his duty in that having arrested and brought Dwight Johnson the applicant to trial on [sic] that
- (a) he refused to take a statement from Veronica Scott who told him that it was

not Dwight but his brother Damion who was the perpetrator of the crime.

- (b) having been told that it was Damion who was the perpetrator he refused to seek him out and question him or take a statement and
- (c) having confronted the Applicant Dwight Johnson and was told (see page 89 to page 92 lines 1-4 of the Notes of Evidence) and was told [sic] by him that he was asleep, and did not chop up anybody, he did not question the lady who opened the door to his room that morning as to his whereabouts at the material time of the accident, which might have assisted him - seeing that alibi was the applicants [sic] cardinal defense. These acts of dereliction eroded the possible defense of the applicant and breached his right to a fair trial guaranteed by section 20 (1) of the Jamaica [sic] Constitution and an acquittal should have been directed accordingly."

[8] Mr Hines, for convenience, argued grounds one and three together. In his written and oral submissions, he submitted that there was evidence in the form of an oral statement from Veronica Scott given by the investigating officer, that it was not the applicant who chopped the complainant, but it was his brother Damion who was the perpetrator. He submitted that it was clear that Veronica Scott was a party who could have assisted in the investigation and this point should have been made clear to the jury. He further submitted that it was the duty of the judge to take a statement from Veronica Scott to ascertain the reason for making that allegation. The investigating

officer's refusal, he argued, not to take a statement because Veronica Scott was not inside the room at the time of the incident was not sufficient reason. He said that although the learned judge, in her summation, pointed out that statements could have been taken from persons other than those inside the room at the time of the incident, that was not sufficient.

[9] Mr Hines further submitted that it was the duty of the officer, as an agent of the state, to have taken statements from all who could have assisted in the investigation. He further submitted that the officer, in a clear dereliction of duty, failed to find Damion so that he could be questioned. He argued that it was not only the officer's duty to have interviewed the applicant's girlfriend, but also Damion and the lady who opened the door. He said it was the duty of the learned trial judge to have pointed this out to the jury because this failure eroded the defence of the applicant.

[10] Mr Hines also submitted that the learned trial judge further erred when she invited the jury to speculate by stating that if the police found Damion, what could be done with him and who would be able to point him out because the complainant already said it was the applicant. He further submitted that the learned trial judge was speculating as to what Damion could have said or how he would have responded. She was also speculating, he argued, when she said there was no evidence of anyone who would be able to point out Damion. The learned judge, he said, should have reminded the jury of the fact that the investigating officer did not take a statement from either Veronica Scott or Damion.

[11] Mrs Seymour-Johnson for the Crown submitted that there was no merit in the grounds argued by Mr Hines. She submitted that the investigating officer cleared up the matter when he testified that Veronica Scott had been questioned and she had said that she was not in the room when the incident happened. The officer also said she was in the washroom at the time of the incident and the washroom was located downstairs and out of the line of sight from the room. Counsel also submitted that the applicant was correctly identified by the complainant.

[12] Counsel submitted that the incident occurred at 6:40 am when the room was well lit and clear enough for the complainant to have seen his attacker. The applicant was well known to the complainant.

[13] Counsel submitted that there was no basis for the investigating officer to follow up on the accusation by Veronica Scott since she was not a witness to the incident. There was no necessity for the officer to have taken a statement from her in pursuing his investigation, she argued.

### **Analysis**

[14] Counsel for the applicant based his grounds of appeal on his contention that the learned trial judge ought to have directed the investigating officer to take statements from Veronica Scott, the girlfriend of the complainant, and the lady who opened the door to the applicant's room on the morning he went to arrest him. In our view, a judge has no duty or responsibility to direct an investigating officer on how to carry out his duties and to collect statements from witnesses. This is the sole responsibility of



the investigators. Mr Hines has produced no authorities to support his contention and we do not know of any.

[15] The investigating officer testified that when Veronica Scott was questioned, she said she was not in the room at the time of the incident and that she was in the washroom. It is quite clear that she was not a witness to the incident and could not speak on the matter as she had not seen what had taken place.

[16] We are of the view that there is no merit in the grounds argued by counsel for the applicant. It was a question of credibility of the complainant which was adequately dealt with by the learned trial judge.

[17] The main issue in this case was whether the applicant was correctly identified. The applicant was known to the complainant. He was no stranger, as he knew the applicant to be the landlord of the house in which he lived with his girlfriend. He had seen him on previous occasions on the street near the house. The incident occurred in the morning when the sun had been streaming through the window of the complainant's room and he could clearly see the applicant. Although the complainant said the incident lasted an hour, the learned trial judge was entitled to say that as a person with his level of literacy, being unable even to spell his own name, the complainant was most likely unable to accurately assess time and to say that the incident must have taken place a few minutes before the complainant ran from the room. The complainant was asleep when he felt the first slap, then he jumped up and faced the applicant. He spoke to the applicant and the applicant responded with

expletives and then the applicant chopped him on the right hand and then chopped off the left hand. This would have been sufficient time for observing the applicant.

[18] The learned trial judge, in our view, gave adequate directions as it related to the issue of identification as she was duty bound to do, by using the **Turnbull** guidelines. (See **R v Turnbull** [1976] 3 All ER 549).

[19] On the issue of alibi, the learned trial judge, in our view, gave adequate directions to the jury. The applicant, in his defence, stated that the complainant had a motive to fabricate a case against him. At page 51 of the transcript, the learned judge said:

“Mr Johnson tells us that his understanding of why he was charged in this case is that when he was shot on the 29<sup>th</sup> of August 2005, the man who shot him sent a message to Mr McKnight’s family that if anything happened to them they should call his name....

Simply put McKnight was framing Johnson in order to keep him from giving evidence in another case, putting pressure on him since he, Johnson, was the complainant in the other case involving the son of McKnight’s girlfriend.”

At page 53, the learned judge continued:

“So Madam Foreman and your members, if you believe the accused man that he knows nothing about the incident, he was not there, he was elsewhere and so your verdict would have to be not guilty.”

[20] In our examination of the summation of the learned trial judge, we are of the view that she gave a balanced review of the evidence and we see no reason to disturb

the finding of the jury. It is for the foregoing reasons that we refused leave to appeal.